No. 84-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

REPLY BRIEF FOR PETITIONER

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This brief will reply to arguments made by Respondent, the American Civil Liberties Union, and the American Booksellers Association, et al., without repeating arguments made in Petitioner's initial brief.

ARGUMENT

I.

RESPONDENT MAY BE PROSECUTED FOR DISTRIBUTING OBSCENE MATERIAL DESPITE THE ABSENCE OF A PRIOR FINAL JUDICIAL RULING THAT THE MATERIAL IS IN FACT OBSCENE.

Respondent first appears to claim that, until there has been a final judicial determination that a particular item is obscene, there is no crime in distributing it.[1] He was, he asserts, entitled to rely on the presumption of First Amendment protection and, because neither "Limited Edition Film Review #10" nor "Diamond Collection #1" had been adjudicated obscene prior to May 6, 1981, he could commit no crime by distributing them. This argument seriously

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[1] In arguing for one dispositive ruling that a particular item is obscene, Respondent's position is related to an issue phrased in the appellant's jurisdictional statement in Miller v. California, 413 U.S. 15, 34 n.14 (1973): "Appellant argues that once material has been found not to be obscene in one proceeding, the State is 'collaterally estopped' from ever alleging it to be obscene in a different proceeding." For a variety of reasons, the Court did not reach the merits of that issue.

misperceives the nature of the presumption and ignores the clear import of Miller, supra. With the adoption of "concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment," 413 U.S. at 29, there is "fair notice to a dealer" id. at 27, in such material that prosecution may occur. The presumption of First Amendment protection, like the presumption of innocence, is procedural rather than factual. Cf. Bell v. Wolfish, 441 U.S. 520, 532-33 (1979) (presumption of innocence allocates burden of proof at trial; it creates no substantive right of pretrial detainee in conditions of confinement). When dealing with books or films in the obscenity context, the presumption places constraints on seizures causing a prior restraint of free expression by requiring "a higher hurdle in the evaluation of reasonableness" under the Fourth Amendment. Roaden v. Kentucky, 413 U.S. 496, 504 (1973). Nothing in the prior decisions of this Court has suggested that States may not punish the distributor of an item unless it had

already been judicially declared obscene prior to the distribution. That argument should be rejected here.

II.

NEITHER THE WARRANTLESS ARREST OF RESPONDENT NOR THE RETRIEVAL OF THE PURCHASE MONEY REQUIRES SUPPRESSION OF THE MAGAZINES.

A.

DETECTIVE EVANS ACTED PROPERLY IN EFFECTING THE PURCHASE AND ASSISTING IN RESPONDENT'S ARREST.

In the course of his argument, Respondent obliquely mentions two facts, giving them undue significance. They are 1) that Detective Sweitzer arrested Respondent for a sale made to Detective Evans, implying a violation of the requirement of Maryland law that a warrantless misdemeanor arrest be made only for a crime committed in the arresting officer's presence; and 2) that Detective Evans was directed to purchase magazines whose covers depicted sexual acts that were distasteful to him, implying that Evans' standard for selecting the magazines was

deficient under the Miller test. Neither point need detain the Court long.

Although Detective Sweitzer was officially the arresting officer, Detective Evans was there with him as part of the arresting team shortly after the sale of the magazines. Moreover, it is not altogether clear that the common law presence requirement is "constitutionally indispensible." State v. Berker, 391 A.2d 107,111 (R.I. 1978). In any event, Evans' knowledge is presumed to be shared by a cooperating law enforcement officer, Illinois v. Andreas, ___ U.S. __, 103 S.Ct. 3319, 3324 n.5, 77 L.Ed.2d 1003, 1010 n.5 (1983). See also, United States v. Hensley, 469 U.S.__, 105 S.Ct. 675, 681-83, 83 L.Ed.2d 604, 612-15 (1985). The police team concept has been applied to the observation requirement for a misdemeanor arrest, Brown v. State, 442 N.E.2d 1109, 1115 (Ind. 1982); State v. Chambers, 299 N.W.2d 780, 782 (Neb. 1980). The arrest here, by Detective Sweitzer, accompanied

by Detective Evans, who personally observed the sale, complied with the "in the presence" requirement.

Respondent futher finds fault in the direction to Detective Evans to select magazines with depictions of explicit sexual conduct on their covers that were distasteful to him. He apparently claims that this standard is deficient under Miller, which is based, in part, on community, rather than individual, standards. Evans' selection standard and decision to purchase are irrelevant to the question whether the later arrest and retrieval of the money converted the purchase into a constructive seizure. Moreover, it is difficult to discern what other standard could have been applied. Only the covers of most magazines were visible because they were sealed in plastic. Consequently, prior to purchase the item could not be examined to determine: (1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the purient interest or (2) whether the work, taken as a

whole, lacks serious literary, artistic, political, or scientific value, two thirds of the Miller test. See, Brief for Petitioner at 32 n.9. The only criterion that could be assessed from viewing the cover alone was whether the work depicts or describes sexual conduct in a patently offensive way. If an experienced vice squad officer found the depictions to be distasteful, there certainly would be a good chance that they were, in fact, patently offensive. Under the circumstances, the directions to Detective Evans, even if relevant to the disposition of the case, were appropriate.

B.

A PURCHASE, EVEN WHEN ACCOMPANIED BY AN INTENT TO RETRIEVE THE PURCHASE MONEY IF A WARRANTLESS ARREST ENSUES, DOES NOT TRIGGER APPLICATION OF THE EXCLUSIONARY RULE.

Respondent and the American Civil Liberties Union argue that the character of the police conduct in obtaining the magazines must be assessed in light of the actions taken after their purchase. Their position is that an unconstitutional seizure occurred when the

police retrieved the purchase money. The Exclusionary Rule, they argue, demands that the magazines be suppressed. This argument ignores the very clear pronouncements of this Court that only the fruits of unreasonable searches and seizures will be within the reach of the Exclusionary Rule. Unless the allegedly unconstitutional conduct bears a "causal relation" to discovery of the evidence, there is no "fruit" to be suppressed. United States v. Sharpe, ___ U.S. ___ (53 U.S.L.W. 4346, 4348, 36 Cr.L. 3917, 3199, March 20, 1985). Here, the later arrest and retrieval of the money did not influence the earlier obtention of the evidence. As the ACLU concedes (Br. at 5), there would be no Fourth Amendment question had the police purchased the magazines and not returned to arrest Respondent without a warrant. In short, there can be no tainted fruit before there is a poisoned tree.

The claim by Respondent that the events here paralled those in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), is totally unsupportable. The only

similarity is that a purchase occurred at the beginning of the sequence of events in both cases. However, in Lo-Ji, the ensuing extensive, six hour search, purportedly authorized by a warrant, was characterized as "reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect." Id. at 325. No such abuse occurred here.

The search condemned in Lo-Ji began when the magistrate and police entered the store five days after the purchase and proceeded to view films without paying, to examine magazines by removing wrappers, and to announce an intention to open each box of film. The inventory of items seized covered 14 pages and included 431 reels of film and 397 magazines. The magistrate was, at times, "one with the police and prosecutors in executive seizure," Id. at 328. Thus, when he viewed the film containers and films without paying, "he was not seeing them as a customer would ordinarily see them." Id. at 329. This Court did not

invalidate the surreptitious viewing of material for potential obscenity, even by a magistrate. Indeed, the role of the justice in Lo-Ji was contrasted with that of the judge in Heller v. New York, 413 U.S. 483 (1973), who "viewed a film in a theater as an ordinary paying patron," prefatory to issuance of a warrant for its seizure. The searching in Lo-Ji was significantly more intrusive than anything an ordinary customer would be able to accomplish. Accordingly, it was held to violate the Fourth Amendment. Here, of course, the police only viewed and purchased the magazines as an ordinary paying customer would. Their later actions, in arresting Respondent and retrieving the money, even if unlawful, are neither themselves a general search nor capable of converting the initial purchase into a general search.

C.

NEITHER THE FIRST AMENDMENT NOR PRIOR DECISIONS OF THIS COURT MANDATE A JUDICIAL DETERMINATION OF PROBABLE OBSCENITY PRIOR TO ARREST.

Respondent and both amici supporting him argue that this Court has already decided, in Heller v. New York, 413 U.S. 483 (1973) and Roaden v. Kentucky, 413 U.S. 496 (1973), that warrantless obscenity arrests are unconstitutional. Petitioner submits, much to the contrary, that it would be a strained and unnecessary extension of those prior decisions if the First Amendment is held to create a per se prohibition on obscenity arrests without a warrant.

In Roaden, the Court considered the seizure of a film as an incident to a lawful arrest. The seizure of the film was invalidated because it effected a prior restraint by taking the film from the commercial theater where it was scheduled to be played and replayed. There was no suggestion whatsoever that

the underlying arrest of the theater manager was unlawful. Had the Court ruled that a warrantless obscenity arrest was illegal, the search incident would automatically have been illegal and there would have been no need to examine an alternative basis for suppression in the First Amendment implications of the search incident. For all the reasons heretofore stated by Petitioner and the United States, the warrant requirement applied to the seizure of materials presumptively protected by the First Amendment should not be extended to an arrest of the distributor.

III.

THE DOUBLE JEOPARDY CLAUSE DOES NOT COMPEL THE DISMISSAL OF THE CHARGES IN THIS CASE.

Respondent argues, supported by the ACLU, with reference to Title 28 U.S.C. §2106, that the exercise of remedial power by the Court of Special Appeals should be accorded deference. The reference in Burks v. United States, 437 U.S. 1, 17 (1978), to that

code section explained that an appellate court may grant appropriate relief regardless of the specific relief requested by a party. No such question is presented here. The more serious flaw in Respondent's argument is that the Court of Special Appeals was not exercising discretionary authority, but rather was ordering the relief it thought the federal constitution required. Where federal law is cited and it is not clear that there is an adequate and independent state ground for a decision, this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Michigan v. Long, __ U.S. __, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201, 1214 (1983).

Furthermore, Respondent's focus solely on the necessity vel non of the magazines to successful prosecution ignores the differences in Maryland law between, on the one hand, an acquittal or dismissal, and the entry of a nolle prosequi, on the other. Under the Maryland Code, Art. 27, §737 expungement of

police and court records may be obtained immediately by a person who has been acquitted or whose charge is dismissed, without regard to the pendency of other criminal proceedings. The recipient of a nolle prosequi, however, must wait three years to file a petition for expungement and may not obtain that equitable relief if he has since been convicted of a crime or is then a defendant in a pending criminal proceeding. This distinction has been upheld against an equal protection challenge, Ward v. State, 37 Md. App. 34, 375 A.2d 41 (1977). That state law distinction should not be defeated simply because the State cannot demonstrate that the result in the immediate criminal proceeding will be different if the case is remanded without directions to dismiss. Rather, because the protections embodied in the double jeopardy clause are not offended when an appellate court reverses for the erroneous admission of evidence, the remand should not bar a retrial,

regardless of the apparent sufficiency of the remaining evidence.

CONCLUSION

For these reasons and those stated earlier, the judgment of the Court of Special Appeals of Maryland should be reversed.

Respectfully submitted,

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